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Susan Grimes, CARP Specialist
U.S. Copyright General Counsel's Office
Library of Congress
Independence Avenue
Washington, DC

Re: Docket Number 2000-9, CARP DTRA 1 & 2

Dear Ms. Grimes:

Regarding the Report of the Panel in this matter, which was delivered to you yesterday, the Panel has discovered a second typographical error which should be corrected in the final and public version of the Report. Inadvertently, the summary of royalty rates set forth in Appendix A has a blank box in the column entitled "Ephemeral License Fee" for entry 3(c), which is labeled "Non-CPB, Non-Commercial Broadcaster." Consistent with the text of the Panel's report, of which Appendix A is a summary, this box should not be blank. It should contain an entry which reads "9% of Performance Fees Due."

Thank you again for your assistance in making this correction to the Report of the Panel and for bringing this to the attention of the parties.

Sincerely,

Eric E. Van Loon / JES

Eric E. Van Loon, Chairperson

Jeffrey S. Gulin

Jeffrey S. Gulin, Arbitrator

Curtis E. von Kann / JES

Curtis E. von Kann, Arbitrator

Dated: February 21, 2002

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GENERAL COUNSEL
OF COPYRIGHT

Susan Grimes, CARP Specialist
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unattractive.³⁵ Under such circumstances, the resulting rates must be deemed to constitute above-market rates. In addition to Spike Internet Radio (*see* n.33, *supra*), both musicmusicmusic ("MMM") and Websound fall into this category.

MMM was the very first license which RIAA negotiated at its predetermined "sweet spot." *See* Section V.G.1., *supra*. MMM had at least three reasons to need an immediate license: (1) to diffuse negative publicity stemming from a Canadian cease-and-desist order, (2) to generate positive press promotion by becoming the first RIAA licensee, and (3) to allay concerns of foreign investors respecting an upcoming initial public offering in Germany. Thus, MMM was extraordinarily eager to secure a voluntary license from RIAA. (*See* Webcasters PFFCL ¶¶ 150-53; RIAA Exhibit 128 DR.) Furthermore, MMM clearly perceived an RIAA license to be more valuable than a statutory license. (*See* Webcasters PFFCL ¶¶ 155-61.) In fact, Mr. Spegg of MMM candidly acknowledged that, because of these factors, he had not been motivated to negotiate the most favorable rates with RIAA and was willing to overpay substantially for the statutory rights.³⁶ *See* Tr. 12929-33 (Spegg). Except as to the precise definition of the revenue base, MMM docilely accepted RIAA's proposed 15% of revenue fee model virtually without substantive negotiation. *See id.*

The Panel also finds that Websound felt a similar sense of urgency. Websound appeared to have been under two time pressures: (1) to resolve uncertainty regarding

³⁵ For example, time may not have permitted such negotiations. Or, services might have found the prospect of negotiating a DMCA-compliant license with multiple record companies (that all had access to confidential RIAA records) quite unattractive. Indeed, only one service did conclude a DMCA compliant voluntary license. *See* Section V.E. *supra*.

³⁶ We assume this reasoning also applied to the renewal license (*see* RIAA Exhibit 60A DR), and note that in the renewal agreement, MMM successfully negotiated a type of mutual MFN clause.

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whether the service would qualify for the statutory license (*see* RIAA Exhibit 136 DR at N9422), and (2) to secure confirmation of its license status for its customers. *See id* at N9421-23, N9720, N9751, N9772-73. *See also* Tr. 10122-26 (Marks). It is also significant that Websound is a very minor player in this market. Despite acceding to one of the highest royalty rates, it has paid less than \$16,000 since the agreement was executed in September 2000 – less than 1% of the fees paid by Yahoo! over a similar period. *See* RIAA Exhibit 15 RR.

For these reasons, the Panel concludes that the MMM and Websound agreements reflect buyers at the high end of the rate range and are, as such, of little use as benchmarks for the average marketplace rate.

Putting aside licensees which either (1) paid no royalties beyond the prescribed minimum, (2) quickly ceased operating, or (3) could not wait for the statutory license, only three of RIAA's 26 licensees remain: MusicMatch; Lomasoft; and Yahoo!. Each of these three merit individual discussion.

4. MusicMatch License Agreement

Because the negotiation of the MusicMatch agreement was closely associated with the settlement of infringement litigation initiated by RIAA, it cannot be reasonably characterized as the product of marketplace negotiations between a typical willing buyer and a typical willing seller. Indeed, in order to end RIAA's litigation against it, MusicMatch eventually accepted license fees and terms less favorable than those it had rejected prior to the litigation. *See* Webcasters PFFCL ¶¶ 137, 140-44; RIAA exhibit 115 DR; RIAA Exhibit 152 DR. The Panel also notes that this agreement contains a type of

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MFN clause which is tied to the royalty rate this Panel will set in this proceeding.³⁷ This provision further erodes the usefulness of this agreement as a benchmark for what willing buyers and willing sellers would agree to in a hypothetical marketplace where no statutory license (and therefore no CARP proceeding) existed. *See* n.37, *supra*. Accordingly, the Panel finds that this agreement reflects rates above those that willing buyers and sellers would normally negotiate and, in any event, its MFN clause renders it of little use as a benchmark.

5. Lomasoft License Agreement

The Lomasoft agreement, RIAA's second license, was negotiated shortly after the MMM license described previously. *See* Marks W.D.T. (Attachment B). With minor exceptions, it contained the same percentage of revenue fee model as the first license.³⁸ *See id.* The record indicates that Lomasoft is another small service, whose two operators had no prior music licensing experience. *See* Tr. 13109-13, 13119 (Heilbronn). Moreover, since concluding its license agreement with RIAA in August 1999, Lomasoft paid total royalties of approximately \$40,000 (about 2% of Yahoo! payments). *See* RIAA Ex.15 RR.

The probative value of the Lomasoft license is also diminished because it has expired and not been renewed. *See* Tr. 13105, 13114 (Heilbronn). Apparently realizing

³⁷ In its renewal agreement, MMM successfully negotiated a type of mutual MFN clause whereby either party would be entitled to terminate the agreement in the event the Librarian ultimately approves a rate at least 25% higher or lower than the agreement rate. *See id.* This further renders the agreement less useful as a benchmark. It would be circular reasoning for the Panel to rely upon an agreement to establish a marketplace rate that is itself tied to rates set by the Panel.

³⁸ RIAA informed Lomasoft that "*all of the licenses* that we do without per performance are 15% of revenues...." (emphasis added). RIAA Exhibit 129 DR at RIAA N8552.

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that he initially overpaid, Mr. Heilbronn never seriously discussed renewal of the license. He testified that "we never really got into those discussions because we ultimately decided that we thought it would be better, at least, just to see what would happen with the arbitration proceedings and hopefully bigger players than us might be able to negotiate better rates." Tr. 13115.

Evidently, Lomasoft deemed negotiations with RIAA a futile mismatch. We do not doubt this to be the case. Lomasoft negotiated a license agreement that does not even grant it the right to make multiple ephemeral copies (see RIAA Exhibit 61 DR at §§ 2.2, 2.5), although it appears that the company requires such copies. Cf. Tr. 14972-74. Indeed, Lomasoft believes that the *performance* license *did* grant it the right to make ephemeral copies at no additional charge (see Tr. 13106-07 (Heilbronn)), even though the agreement clearly excludes such rights. See RIAA Exhibit 061 DR at §§ 2.2, 2.5. This record reflects grossly mismatched negotiating parties.³⁹

³⁹ In addition to Lomasoft, a clear majority of the original 26 RIAA agreements did *not* grant the right to make ephemeral copies, including original licenses for Radiofreeworld, NRJ Media, JamRadio, Visual Dynamics, OnAir.com, eNashville, GaliMusica, Spacial Audio Solutions, Multicast Technologies, SLAM Media, Fansedge, Cybertainment, Beem-Me-Up, and Cornerband. We recognize the possibility that some of these services may have erroneously perceived that they could operate their services without this right. Cf. Tr. 14970-71 (Garrett). But interestingly, of these licensees that ultimately renewed their licenses, each renewal contained the grant of rights to make ephemeral copies (for a specified fee). See RIAA Exhibits 062 DR (Radiofreeworld), 063 DR (NRJ Media); Tr. 14969 (Garrett) (Multicast renewal). Because the record does not reflect that any of these licensees changed the manner in which they delivered their services from the first license to the second, we must assume that they required an ephemeral license all along. Moreover, RIAA's own expert witness testified that the process of "ripping" CDs to a server entails copying. See W.D.T. of Griffin 6. See also Tr. 8651 (Talley) (ephemeral [buffer] copies are produced whenever a CD is played). Thus, these licensee's lack of sophistication further enhanced RIAA's ability to secure above-market rates that it could later offer as benchmarks.

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.....APPENDIX A.....

SUMMARY OF ROYALTY RATES FOR SECTION 114(f)(2) AND 112(e) COPYRIGHT
STATUTORY LICENCES

Type of DMCA – Complaint Service	Performance Fee (per performance)	Ephemeral License Fee
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1. Webcaster:

(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07 ¢	9% of Performance Fees Due
(b) All other internet transmissions.	0.14¢	9% of Performance Fees Due

2. Commercial Broadcaster:

(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07¢	9% of Performance Fees Due
(b) All other internet transmissions.	0.14¢	9% of Performance Fees Due

3. Non-CPB, Non-Commercial Broadcaster:

(a) Simultaneous internet retransmissions of over-the-air AM or FM broadcasts.	0.02¢	9% of Performance Fees Due
(b) Other internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station.	0.05¢	9% of Performance Fees Due
(c) Transmissions on any other side channels.	0.14¢	

4. Business Establishment Service:

For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. § 114(d)(1)(C)(iv)	Statutorily Exempt	10% of Gross Proceeds
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5. Minimum Fee:

\$500 per year for each licensee.

[Definitions and Provisions for the application of the above rates are set forth in Appendix B to the Report.]